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NOV 27 1995

November 27, 1995

OUR FILE NO.
0080-108-63

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 95-92

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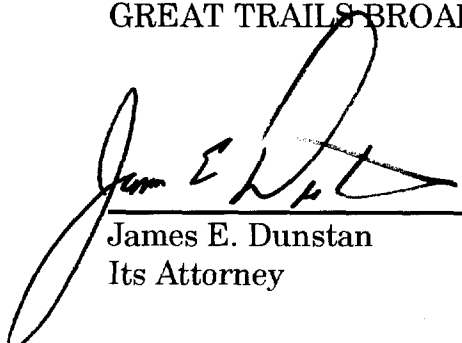
Dear Mr. Caton:

Submitted on behalf of GREAT TRAILS BROADCASTING, INC., is its "REPLY COMMENTS" in the above-referenced proceeding. Enclosed are an original and eight copies, a copy for each Commissioner.

If there are any questions concerning this matter, please communicate directly with this office.

Respectfully submitted,

GREAT TRAILS BROADCASTING, CORP.



James E. Dunstan
Its Attorney

JED/cap

Enclosures

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Before The
Federal Communications Commission
Washington, D.C. 20554

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NOV 27 1995

STANDARD BUREAU OF RECORDS
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter Of)
)
Review of the Commission's)
Regulations Governing Programming)
Practices of Broadcast Television)
Networks and Affiliates)

MM Docket No. 95-92

To: The Commission

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**REPLY COMMENTS OF
GREAT TRAILS BROADCASTING CORP.**

Respectfully Submitted,

GREAT TRAILS BROADCASTING CORP.

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November 27, 1995

SUMMARY

Commenters in this proceeding are engaging of a “winner take all” battle of economic theory. Networks generally claim that they lack the market power they wielded in the 1970s, and thus most aspects of Section 73.658 should be eliminated. Stations generally claim that network power has not waned significantly, and therefore the rule should remain in place. Yet very few commenters site to any public interest standard to support their position.

Concerning the territorial exclusivity provision contained in Section 73.658(b), most networks (with the notable exception of CBS), and major broadcasters seek to eliminate the rule or expand exclusivity zones to encompass a station’s DMA. Several commenters, however, including CBS and the Small Business Administration, urge the FCC to proceed with caution in redefining Section 73.658(b), because of the harm which would befall stations such as WHAG-TV, Hagerstown, Maryland, which could lose its NBC affiliation if the rule as proposed were adopted. The result of a DMA-wide exclusivity zone would be the net loss of significant local news to outlying areas of many markets.

Great Trails again demonstrates herein that a 35-mile network territorial exclusivity zone is the best compromise between the existing “same community” rule and a DMA-wide zone that works only for relatively small geographic markets with a single economic center. A 35-mile zone would bring the network territorial exclusivity rules in Section 73.658(b) in line with the syndicated exclusivity rule contained in Section 73.658(m). Such a rule would allow stations to bargain for exclusivity up to the area they reasonable are able to cover with their signal, while at the same time protecting overshadowed affiliates that were created to provide network programming, *and substantial local news and informational programming*, to outlying areas of a market.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	1
II. THE COMMENTS DEMONSTRATE THE POTENTIAL HARM WHICH WILL BEFALL OUTLYING NETWORK AFFILIATES SHOULD SECTION 73.658(b) <u>BE MODIFIED AS PROPOSED</u>	2
III. A 35-MILE TERRITORIAL EXCLUSIVITY ZONE <u>CONTINUES TO MAKE THE MOST SENSE</u>	7
IV. <u>CONCLUSION</u>	10

Before The
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In The Matter Of)	
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Review of the Commission's)	MM Docket No. 95-92
Regulations Governing Programming)	
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To: The Commission

REPLY COMMENTS OF
GREAT TRAILS BROADCASTING CORP.

Great Trails Broadcasting Corp. ("Great Trails"), by its attorneys, hereby files these Reply Comments in the above-referenced proceeding. In support of its Reply Comments, Great Trails submits:

I. INTRODUCTION

Not surprisingly, the comments in this proceeding advance the economic interests of the individual commenters. By and large, the traditional networks want Section 73.658 eliminated or heavily modified, claiming they no longer exercise market power over their affiliates.¹ Commenters representing stations generally support continuation of most aspects of Section 73.658, arguing that the networks still retain significant market power which must be checked by regulations.² Yet these same commenters, representing the interests of substantial group

¹ See *NBC Comments*; *Capital Cities/ABC Comments*. As discussed *infra*, CBS supports Great Trails' position that the network territorial exclusivity provision of Section 73.658(b) should not be modified, or if modified, not extend to encompass the entire DMA as the *NPRM* contemplates.

² See *INTV Comments*; *Network Affiliated Stations Association Comments*; *Post-Newsweek Comments*; *Cosmos Broadcasting Comments*; *Blade Broadcasting Comments*.

owners with stations in major markets, urge for the repeal of the territorial exclusivity provision (Section 73.658(b)), seeing nothing wrong with extending exclusivity as far as their economic power will allow.³

What is surprising is the almost total lack of any reference to the public interest in the comments filed in this proceeding. Apparently, the commenters view Section 73.658 as pure economic regulation with no policy basis; that this regulation represents a game of tug-o-war, where to the victors go the spoils. This proceeding is about much more than the economic struggle between networks and major group owners, however. The Commission's decision in this proceeding will have significant impact on individual viewers, and as Great Trails and others pointed out in their comments, modification of certain aspects of Section 73.658 puts at significant risk substantial local programming for viewers removed from the geographic core of a particular economic market. This risk is most apparent in the territorial exclusivity limitation contained in Section 73.658(b), and the Commission's proposal to extend network exclusivity zones to equal a station's DMA.

II. THE COMMENTS DEMONSTRATE THE POTENTIAL HARM WHICH WILL BEFALL OUTLYING NETWORK AFFILIATES SHOULD SECTION 73.658(b) BE MODIFIED AS PROPOSED

In addition to the comments filed by Great Trails, several other commenters help demonstrate the dire consequences that would befall network affiliates in outlying areas should Section 73.658(b) be modified to allow stations to purchase exclusivity coextensive with their DMAs. Southern Broadcast Corporation of Sarasota's ("SBC") comments

³ *INTV Comments at p. 21 & n.36; October 30, 1995 Letter of NASA to Chairman Hundt ("NASA Letter") at p. 1.*

highlight the fact that with the emergence of Fox and the other new networks, loyalty and local public service run a distant second and third to the networks' perceived need to maximize VHF outlets in the largest markets. *SBC Comments*, pp. 11-14. If the VHF ABC affiliate in Phoenix could lose its affiliation after over 40 years because of the economic power of a group owner, what chance do smaller market stations, or smaller group owners, have in retaining their affiliations in the face of a demand by a larger market for increased territory? The answer is slim and none in today's network affiliate world.

One of the few non-interested parties to comment, the United States Small Business Administration ("SBA") strongly urges the Commission to be careful not to deprive viewers of local programming by turning loose the economic power of large market stations. SBA states that any change to Section 73.658 "needs to be considered in light of the potential problems that [change] may create for smaller network affiliates within the confines of a larger area." *SBA Comments at p. 15*.

Post-Newsweek sums up the world that would exist without the restraints on economic power contained in Section 73.658. "[T]he big loser would be the viewing public. With the implementation of the proposal, audiences would receive less diversity in their programming and fewer local and independent programs." *Post-Newsweek Comments at p. 7*.⁴ The Network Affiliate Stations Association ("NASA") also urges the Commission to be cognizant of the impact any rule change may have on

⁴ Interestingly, while Post-Newsweek forecasts these dire results, it nonetheless supports INTV's position that major market stations should be able to squeeze out outlying affiliates by expanding territorial exclusivity to include a station's entire DMA. Apparently only viewers in the geographic center of markets are entitled to diverse and local programming, according to Post-Newsweek.

smaller stations. “We urge due consideration for the comments of any smaller or overshadowed stations that may bring particular circumstances to the Commission’s attention.” *NASA Comments at p. 39.*

CBS is one of the few commenters to realize (or admit) that Section 73.658(b) differs from the other provisions of Section 73.658, because it addresses affiliate qua affiliate relations, not affiliate qua network relations. *CBS Comments at p. 34.* CBS urges the Commission not to modify the territorial exclusivity rule, stating:

Although it is quite unusual for a network to have more than one affiliate within the same DMA, this does occur in certain geographically large markets where a network would be unable to reach a significant number of homes with over-the-air service if it had only a single affiliate. In such situations, the public interest would not be served by allowing a station in the market’s dominant city to preclude its network from affiliating with a station licensed to a community at the margins of its own service area, thereby depriving a substantial number of non-cable subscribers of the network’s programming.

Id. at pp. 37-38.

Commenters who support expansion of the territorial exclusivity zone either miss the point or the impact of the current proposal. Warner Brothers, for example, applies a typical East Coast mentality to the issue in concluding that the current territorial limitation can safely be expanded to include DMAs. After all, WB points out, the geographic closeness between markets such as Washington, D.C.-Baltimore, Philadelphia-New York, and others will preclude any one station from gobbling up excessive territory. The problem with the WB analysis, however, is that it is only true for the limited cases cited. Yes, the geographic proximity of markets like Washington, D.C.-Baltimore and Philadelphia-New York, as well as their approximate equal size will

preclude stations in either market from obtaining a single affiliation to serve both markets. Take either check and balance away, however, and the markets become ripe for abuse.

WB cites the easy case concerning Washington, D.C., but doesn't deal with the tougher case of WHAG-TV, Hagerstown, Maryland. The distance between Washington, D.C. and Baltimore is just over 35 miles. The distance between Washington, D.C. and Hagerstown is over 60 miles. It is clear that elimination of Section 73.658(b) would not result in the loss of any affiliation in either Washington, D.C. or Baltimore. As between Washington, D.C. and Hagerstown, however, there is a different story. Even though Hagerstown lies further from Washington, D.C. than does Baltimore, there is a far greater chance that WHAG-TV could lose its affiliation. This is because WHAG-TV is located in the Washington, D.C. DMA, and lacks the market clout to save its affiliation should NBC decide that it provides sufficient *network* coverage to Maryland via its Washington, D.C. owned and operated affiliate, WRC-TV.⁵ The result of this, however, would be that viewers in and around Hagerstown, especially points North and West, would lose the local news and public

⁵ NBC's comments in this proceeding contemplate a world where affiliates and the networks are allowed to freely negotiate the extent of exclusivity such that the affiliate is assured that no other affiliate of the same network serves the particular communities it desires. *NBC Comments at p. 45*. NBC places no outer limit on the amount of exclusivity for which an affiliate should be able to contract, not even stopping exclusivity zones at a DMA boundary. NBC must have some limit in mind, however, when it concludes that affiliates and networks should be allowed to negotiate for exclusivity "just as other program suppliers can." *Id.* Since stations can only enter into contracts for syndicated programming for exclusivity up to 35 miles pursuant to Section 73.658(m), NBC appears to agree with Great Trails' proposal to allow exclusivity up to 35 miles to bring Sections 73.658(m) and 73.658(b) into accord. Otherwise, NBC would have stated that networks should be allowed to negotiate for exclusivity zones in excess of what "other program suppliers can."

affairs programming currently offered by WHAG-TV.⁶ Were WHAG-TV to lose its affiliation, and most if not all of that programming would cease to exist, and in all likelihood the station itself would go out of existence without the benefits of a network affiliation.⁷

Capital Cities/ABC's contention that the antitrust laws would preclude market dominance equally misses the point. The antitrust laws existed back when Section 73.658 was enacted, and the Commission then acknowledged that additional regulations were needed to ensure competition and availability of network affiliations to new stations, especially in the UHF band. *See Revision of Territorial Exclusivity Rule*, 12 RR 1537, 1542 (1955). The decades long fight of KICU-TV, San Jose, California, to obtain programming underscores the difficulty in pleading an antitrust violation where stations and program providers have chosen to carve up a geographic market so as to include a particular outlying area.⁸ This case underscores the difficulty individual stations would have in overcoming the "business judgment" defense available to

⁶ As pointed out in its Comments, WHAG-TV airs the following local news programming: 6:30-7:00 a.m.; five minute inserts at 7:25 a.m., 7:55 a.m., and 8:25 a.m. weekdays; 5:30-6:00 p.m., 6:00-6:30 p.m. weekdays; and 11:00-11:35 p.m. Monday-Sunday. In addition, WHAG-TV airs "Today In The Valley," a five minute insert every weekday at 8:55 a.m. in which it provides local non-profit organizations the chance to publicize themselves and upcoming community events. WHAG-TV also airs "Viewpoint 25" on Sunday mornings from 10:00-10:30 a.m., right after NBC's "Meet The Press" as a local public affairs program focusing issues of critical importance to the communities served by WHAG-TV.

⁷ WHAG-TV's particular situation was pointed out by Pappas Stations Partnership in its comments as a reason for the FCC to be "careful in tampering" with the territorial exclusivity rule. *Pappas Stations Partnership Comments*, pp. 3-4 & n.7. Pappas, a long-time smaller market television operator, recognizes that the loss of its NBC affiliation could lead to the demise of WHAG-TV. *Id.*

⁸ *See Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359 (9th Cir. 1986)(upholding dismissal of antitrust claims by District Court); *see also Territorial Exclusivity In Non-Network TV Programming*, 37 RR 2d 695 (1976)(first attempt by San Jose stations to establish market separate from San Francisco).

networks in this situation, *and that case relied on the existing rule in large part as the basis for the antitrust complaint.* Eliminate the rule, and there would be virtually no recourse under the existing antitrust laws to protect overshadowed stations.

III. A 35-MILE TERRITORIAL EXCLUSIVITY ZONE CONTINUES TO MAKE THE MOST SENSE

Commenters provide a variety of suggested changes to the territorial exclusivity rules. A number support the Commission's proposal to expand the zone to include a station's DMA.⁹ None appear to fully support the concept of a Grade B contour, as proposed in the *NPRM* as an alternative to a DMA-wide exclusivity zone. Several commenters suggest adoption of a 35-mile zone.¹⁰ A number of parties urge the Commission not to modify the rule at all.¹¹ Finally, a number of commenters urge the Commission to "grandfather" all existing exclusivity contracts to ensure that overshadowed stations do not lose their affiliations.¹²

As pointed out above and in Great Trails' Comments, expansion of the territorial exclusivity limitation would reek havoc on outlying stations such as WHAG-TV, as well as several other commenters. That there is little or no support for a Grade B contour rule should come as little surprise, given the fact that such a rule would be very difficult to enforce

⁹ See *INTV Comments* at p. 21; *NASA Letter*; *WB Comments* at pp. 19-20; *Capital Cities/ABC Comments* at p. 31.

¹⁰ See *Cosmos Broadcasting Corp. Comments* at p. 22; *Blade Communications Inc. Comments* at p. 24. Both *Blade* and *Cosmos* suggest the 35-mile zone as a minimum, but would also support a DMA-wide exclusivity zone.

¹¹ See *CBS Comments* at pp. 34-38; *Pappas Stations Partnership* at n.7.

¹² See *SBA Comments* at p. 16; *NASA Comments* at p. 39.

from station to station and market to market as affiliations changed. See *Great Trails Comments at pp. 7-8*.

SBA and NASA (representing some 600 stations) put forth the interesting idea of grandfathering all existing affiliation agreements to ensure that any change in Section 73.658(b) would not result in overshadowed stations losing their affiliations. While intriguing, and certainly meeting WHAG-TV's personal needs, Great Trails questions the efficacy of such an action on several counts. First, it is questionable whether the FCC could by regulation modify and extend indefinitely the term of a private contract already in existence. It is one thing for a regulatory body to promulgate rules which must be obeyed in a private contract, as it exists in the present Section 73.658(b). It is a much larger regulatory step to institutionalize and freeze an existing private contract that by its terms has exit terms and a natural end. Great Trails in good conscience cannot support such a proposal, if for no other reason than the possibility that it would not be sustained on appeal, effectively resulting in no protection for outlying stations.

A similar, and somewhat more palatable proposal was put forth by SBC. SBC would have the Commission incorporate in any rule change a rebuttable presumption that a rule violation had occurred in any instance where a network removed an affiliation from any community and did not award another affiliation in the same community. *SBC Comments at p. 21*. Great Trails supports this proposal in theory. The problem with it, however, is that it does not fully take into account problems in hyphenated markets where affiliation switches normally entail the removal of an affiliation from one hyphenated community in a market and awarding of the affiliation to another community in the

hyphenated market (*e.g.*, Tampa-St. Petersburg). Adopting SBC's proposal could result, therefore, in needless paperwork filed at the Commission as networks explain why an affiliation was eliminated from Fresno, California, but awarded to Hanford or Visalia. Great Trails would suggest, therefore, that if the SBC proposal is adopted, that the language be modified to state that a presumption of a rule violation would exist where an affiliation was removed from a community and not awarded to any other named community in a hyphenated market situation.

If what SBA, NASA, and SBC are trying to do is ensure that changes in the Commission's rules do not diminish local service to viewers, then why not attempt to craft a rule that achieves such a goal without resulting to the suspect notion of grandfathering all existing affiliation agreements? That is what Great Trails attempts to do in suggesting that the Commission adopt a 35-mile standard, similar to the one that already currently exists in Section 73.658(m) for syndicated programming. Although the 35-mile zone may appear at first blush to be arbitrary, no one can challenge the fact that it has served very well in the context of syndicated programming. The 35-mile zone would protect the closest geographic major markets (Washington D.C. and Baltimore, MD, just over 35 miles apart), but is not so extensive as to allow stations to overreach and thus deny programming to viewers outside their coverage.

Moreover, adoption of a 35-mile exclusivity zone for network programming would, for the first time in the history of television, result in network and syndicated programming being treated the same in terms of territorial exclusivity. Beyond the logical simplicity of equating the two zones, such a move makes eminent sense in today's television marketplace, where the line between network programming and

syndicated programming continues to blur. With the addition of additional quasi-networks, which air only a fraction of the programming of the "big three," it is sometimes hard to tell the difference between network programming and a block of syndicated programming.

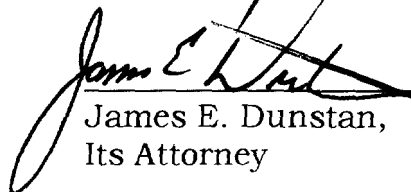
Making the two exclusivity zones in Section 73.658 parallel each other, therefore, makes the most rational sense of any proposal put forth in this proceeding. Great Trails continues to argue for its adoption should the Commission feel compelled to modify Section 73.658(b).

IV. CONCLUSION

Great Trails continues to believe that the network territorial exclusivity rule is not broken, and does not need to be fixed. Comments by groups such as CBS, Great Trails, SBC, and Pappas attest to the positive benefits Section 73.658(b) has. If the Commission concludes that some change is absolutely necessary, then the network territorial exclusivity rule should be amended to expand the exclusivity zone up to 35 miles, and no further.

Respectfully Submitted,

GREAT TRAILS BROADCASTING CORP.



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November 27, 1995

CERTIFICATE OF SERVICE

I, Carol A. Park, an employee of Haley Bader & Potts, P.L.C., certify that on this 27th day of November, 1995, copies of the foregoing "**REPLY COMMENTS OF GREAT TRAILS BROADCASTING, INC.,**" were sent by first-class postage prepaid U.S. First Class mail, to the following:

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Washington, D.C. 20554
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